IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 1120

ANTHONY MAGGIO, CARL IPPOLITO, GUGHELIMO CICCONE, and BARTHOLOMEW DiNOLA,

Petitioners,

against

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

HAROLD SIMANDL,
Attorney for and of Counsel with Petitioners.

ANTHONY A. CALANDRA,
on the Brief.

Arthur W. Cross, Inc., Law Printers, 71-73 Clinton St., Newark, N. J., U. S. A.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully represent:

I.

Summary Statement of the Matter Involved.

1. On December 18th, 1940, an indictment containing five counts was filed in the United States District Court for the District of New Jersey, charging the petitioners and others with unlawfully engaging in the business of distillers, possessing an unregistered still, failing to give

notice of the still, fermenting mash fit for distillation in an unauthorized distillery and conspiring to violate the Internal Revenue laws relating to stills (R. 21 to 27).

2. Several of the defendants having previously pleaded guilty and a severance having been granted as to others, the case proceeded to trial against the petitioners.

3. After the government rested its case petitioner Ippolito made a timely motion for a directed verdict of acquittal since the evidence at that time was wholly insufficient to take his case to the jury (R. 399). The motion was denied and the trial continued as to him and the others. Compelled by the Court's decision to defend himself against the unproved charges Ippolito testified on his own behalf (R. 490, *et seq.*). After several further days of trial and when Ippolito was about to rest his defense the trial court, over his objection (R. 536), permitted the government to reopen its case and permitted one Bematre, who had pleaded guilty at a prior trial, to testify (R. 536, 563). We concede that Bematre's testimony implicated Ippolito in the offenses charged in the indictment. We submit that without doubt, because of the absence of Bematre's testimony when the motion was properly made, Ippolito was entitled to have been acquitted.

4. The District Attorney, directing Bematre's attention to an incident unrelated to the charges which occurred to him personally, deliberately elicited testimony that Bematre had been attacked and robbed by two men, one of whom was the petitioner DiNola. A motion for a mistrial was denied (R. 576) although it was obvious from the nature of the questions that this testimony was designedly introduced by the District Attorney.

5. Mrs. Hahn, a government witness, was asked if she could identify any of the men present in the court room as having been patrons during January and February, 1940, in the Trenton restaurant in which she worked. She could not identify any of the four defendants but identified Bematre and another. Under the guise of surprise and although the testimony thus given had not been in aid of the petitioners, the United States Attorney was given leave to recall her to the stand after a brief cross examination, to cross examine her for the purpose of impeaching her and of neutralizing her testimony (R. 184, 186). She had made a statement in May, 1940, three months after the raid which led to the indictment, in which rogues gallery pictures of individuals were referred to. She had also testified at a prior trial, which ended in a mistrial through no fault of the petitioners, at which time she failed to identify any of the petitioners as patrons of her restaurant and was permitted to leave the stand without having the statement of May, 1940 called to her attention. The day before she testified in the instant case she had told an investigator who was aiding the United States Attorney that she could not identify any of the petitioners and that she intended to adhere to her testimony given at the former trial. Under the pretext of surprise and pretending to neutralize her testimony the District Attorney placed before the jury her hearsay statement that petitioner Maggio and three others were known as the "Big 4" (R. 188), a term implying that those named were arch criminals and underworld characters and that petitioner Ippolito was an associate of the sinister "Big 4" (R. 190). He was thus also able to bring before the jury her statement which mentioned the rogues gallery photograph of Ippolito and "identification numbers" contained thereon (R. 190). It may be said that Ippolito had no prior convictions. A por-

tion of the statement, read in the presence of the jury, related that a person who was identified from a police photograph, was an associate of the "Big 4" (R. 190). While an objection to a reading of this latter portion was later sustained, although overruled at first, the damage had been done.

It is apparent from the fact that Mrs. Hahn was called to testify on a subject matter which had no real significance in the case that the real purpose of the District Attorney in returning her to the witness stand and in cross examining her was to arouse the passions of the jurors by blackening the characters of the petitioners. At other times throughout the trial the District Attorney made a studied effort to have the jury believe that the petitioners were of bad character and therefore likely to commit the offenses with which they were then charged.

6. When the witness Lamantia was leaving the stand the District Attorney sought permission to make an application for his arrest (R. 649). The Court declined to entertain it at that time but despite this, and in the presence of the jury, the witness was arrested by one Glassman, an investigator of the Alcohol Tax Unit (R. 650). Counsel moved for a mistrial because the arrest of Lamantia in the presence of the jury would tend to prejudice the jury against the defendants, but the motion was denied and the jury were instructed to disregard the incident (R. 649, 650). Counsel sought to prove through Glassman that he had in fact placed Lamantia under arrest in the court room, but an objection to the testimony was sustained (R. 651, 652).

7. The jury returned its verdict of guilty on all five counts against all of the defendants (the petitioners) then

on trial. Each of the petitioners was then sentenced to serve three years in a penitentiary, to pay fines and to stand committed until the fines were paid (R. 14-16).

8. Petitioners appealed from the judgments to the United States Circuit Court of Appeals for the Third Circuit. On January 30th, 1942 the judgments were affirmed upon an opinion concurred in by the three judges who had heard oral argument (R. 720). A petition for rehearing was then duly filed and on March 4th, 1942, an order was entered denying the rehearing and withdrawing a portion of the original opinion and substituting in place thereof a new opinion. On this occasion all five judges of the Court constituted the Court (R. 745). The order was the first indication to the petitioners that their case had been considered and acted upon by judges other than those who had originally heard their argument on appeal and considered their case.

II.

Questions Presented.

The questions presented are:

1. Whether a defendant in a criminal case is compelled to testify against himself in violation of the Fifth Amendment to the Constitution, by court action, which compels him to proceed with his defense, despite the absence of sufficient proof to take his case to the jury at the end of the government's case.

2. Is the right of a defendant to freely elect whether or not to testify in his own behalf, as safeguarded by the

Act of March 16, 1878, 20 Stat. at L. 30, c. 37 now 28 U. S. C. A. 632, invaded by action of the trial court in improperly denying a motion for a directed verdict made after the government announces it has no further evidence to offer?

3. Whether in view of the duty of the courts to safeguard the privilege, rights and protection afforded to defendants by the Fifth Amendment to the Constitution and the aforementioned statute, an appellate court in passing upon the trial court's action in denying a motion for a directed verdict is confined to the evidence as it stood at the time the motion was properly made.

4. Whether in a close case the deliberate introduction by the District Attorney of testimony of an unrelated attack and armed robbery alleged to have been committed by a defendant is such prejudicial error as to result in a reversal although the jury is perfunctorily told to disregard such testimony.

5. Whether in a close case a District Attorney may designedly pretend surprise for the purpose of influencing the minds of the jury by placing before it hearsay statements depicting the defendants as criminals and associates of criminals.

6. Whether a District Attorney may plead surprise, knowing in advance of calling the witness that she has already under oath affirmed certain facts and has informed him that she will adhere to her prior sworn testimony and where the witness, prior to the plea of surprise, has testified as the District Attorney must have anticipated.

7. Whether a District Attorney may plead surprise knowing that the witness at a prior trial has previously

testified and insists on testifying in accordance with the testimony given by her.

8. Whether a case argued before and decided by an appellate court consisting of three judges may be later re-decided without oral argument by a court consisting of five judges.

III.

Statutes Involved.

The statutes and rules of court involved are printed in the appendix.

IV.

Statement of the Case.

In the evening of February 24th, 1940, premises on Cuyler Avenue, Trenton, New Jersey, were visited by the local police who seized bags of sugar and empty five gallon cans. On the morning of February 25th, 1940 premises known as 1060 Revere Avenue, Trenton, were raided and an unregistered still, mash and alcohol were taken by the police.

When the government rested its case there was no evidence connecting petitioner Ippolito with the offenses charged in the indictment. The only evidence which had been offered against him was that for some weeks prior to the raid he was seen on occasion in his home and public restaurants in the company of some of the defendants, but on none of those occasions on the raided premises or its vicinity. Since association is not proof of crime Ippolito's motion for a directed verdict, made at the end of the government's case, was improperly denied.

The evidence then offered in defense by Ippolito was a complete denial of any interest or participation in the illegal enterprise. It appears that Ippolito was and had been a resident of Trenton and for a long time had occupied a building in Trenton, on one floor of which he ran a clothing store, his wife conducted a beauty parlor, and on another floor of which was located their living quarters (R. 490). Four or five days after the aforementioned motion for a directed verdict had been made, and while the defendants' case was being presented as we have already shown, Bematre was permitted, over objection, to testify and connected Ippolito with the charges in the indictment.

The evidence against Maggio was, as found by the court below, largely circumstantial. Bematre, who had testified that he knew all about the still and its construction, completely exculpated Maggio, saying that the latter had no interest therein (R. 580, 581).

The testimony against DiNola was that he was acquainted with some of the defendants and was present when Ciccone, on the morning of February 25th, is alleged to have offered a bribe to a police officer to remove the other police from the Revere Avenue address for a few hours. The evidence offered against Ciccone other than Bematre's testimony was the testimony of one Lamantia who said that Ciccone had offered him a job, and after the raid told him that he wanted Lamantia to work at the raided premises. Later in the trial he testified that it was Bematre, not Ciccone, who had offered him the job. There was also testimony that Ciccone offered a bribe to a police officer to remove the police who were conducting the raid.

During the course of the trial government counsel, by direct and unambiguous questions asked of Bematre, elicited testimony that he had been attacked and robbed by

DiNola and another. Although the court below said that this testimony was not responsive and was unsolicited by the United States Attorney (R. 728), it is clear that the court below is in error. Bematre had described a meeting in a boarding house after some of the petitioners and others had returned to that place a second time (R. 575). After stating that an agreement had been made the witness was asked:

> "Q. Did anything happen to *you?* A. Yes.
> Q. What? A. It wasn't that day.
> Q. Well, when was it? A. *You mean to me, myself, personally?*
> Q. *Yes.* A. Well, night time when I was sleeping * * * when I was sleeping there, from my recollection that I can recognize, to be sure, it was Merino and Bucky (DiNola.)
> Q. What happened to *you?* A. *They come in the room and robbed me of what money I had"* (A., p. 575). (Italics ours.)

After Bematre was briefly cross examined with respect to this testimony (R. 610, 638), the District Attorney on re-direct examination proceeded to lead the witness through a recital of the intimate details of the robbery (R. 639). The witness thus testified that petitioner DiNola and Merino entered the room where he was sleeping, and with two drawn guns ordered him to "get up". In DiNola's presence Merino made him stand against the wall and searched the bed and took $97.00 out of the pillow case. Merino then hit him over the head with the gun and warned him not to mention the still or the robbery (R. 640).

The District Attorney also brought to the attention of the jury highly prejudicial testimony immaterial to the issues in the following manner. Mrs. Hahn, called merely to testify that some of the defendants had been seen by

her together in a restaurant in which she worked, had failed to identify any of the petitioners as patrons of that restaurant. At a prior trial, which ended in a mistrial, she had identified two persons then in the court room as patrons and had been permitted to leave the stand at that time without any reference to a statement previously made by her in May, 1940 (R. 184). In that statement she had, by the use of police photographs shown to her, mentioned several of the petitioners as patrons, but the day before her testimony in the instant trial had advised an investigator attached to the United States Attorney's office in the preparation of his case that she was positive in her identification of two of the men (none of them being the petitioners) but was not positive of the others (R. 192). She indicated clearly that she intended to adhere to her testimony given at a prior trial (R. 192). By questioning her further for the ostensible purpose of neutralizing her testimony, although the defendants consented that her testimony be stricken and the witness be withdrawn (R. 186), the District Attorney brought before the jury the hearsay statements attributed to her but denied as having been made by her, that Maggio and three others were known as the "Big 4" and that Ippolito had a police record and was an associate of the sinister "Big 4" (R. 188, 191).

One Lamantia, who had testified for the government and then was called as a witness by the defendants, was arrested in the presence of the jury by an investigator of the Alcohol Tax Unit. To prove the arrest counsel called the investigator but objections to questions addressed to him by the defendants were sustained (R. 651, 652). The court below refused to consider whether such arrest was to the prejudice of the defendants, for which a mistrial should have been declared, giving as its reason that the arrest, if it did occur, took place outside the presence of the

jury (R. 728). When, by their petition for rehearing, petitioners again demonstrated that from the offer of evidence it was clear that the arrest was in the presence of the jury, the court amended its opinion. On this occasion, however, five judges participated, although only three had originally heard the oral argument and considered the case. In effect two judges who had not heard the argument or participated in the original decision were effective in redeciding the case without calling for a reargument.

V.

Reasons for Allowance of the Writ.

1. The Circuit Court of Appeals decided that the action of the trial court in erroneously denying Ippolito and DiNola's motions for directed verdicts, when the government rested its case announcing that it had no further evidence to offer against the defendants, was not an invasion of the defendants' rights guaranteed by the Fifth Amendment to the Constitution, and safeguarded as well by the Act of March 16th, 1878, 20 Stat. at L. 30, chap. 37, 28 U. S. C. 632. It held that the government's case is not closed until all of its evidence introduced at any stage of the trial is in, that the resting of its case is only an intermediate stage of the government's case and that accordingly in considering whether a motion for a directed verdict should have been granted the Court was not confined to the evidence as it stood at the time the motion was properly made.

The decision of the court below conflicts with the principles laid down by this Court in *Bruno* v. *United States*, 308 U. S. 287, that the right of a defendant to freely choose

whether or not to testify may not be invaded or interfered with in any degree by the trial court.

In giving consideration to evidence offered after the government rested its case, and with the aid of such testimony, ruling that a motion for a directed verdict previously made was thereby properly denied, the court below sanctioned the compulsion complained of because it failed to distinguish between motions for directed verdicts made in civil and criminal cases. In criminal cases effect must be given to the right of a person charged with crime not to be compelled to prove his innocence or testify until the government has made a case against him, for to do otherwise would be to compel an accused to convict himself. *State* v. *Bacheller,* 89 N. J. Law 433; *State* v. *Pruser,* 127 N. J. Law 97.

2. The Circuit Court of Appeals decided that the trial court properly refused to grant a motion for a mistrial made because a witness testified to an unrelated attack and armed robbery alleged to have been committed on him by a defendant, saying that such testimony was unsolicited by the United States Attorney and not responsive to his questions. It reached its conclusion although it is obvious that such testimony was deliberately introduced by the District Attorney.

In so deciding the court below failed to follow the principle announced by this Court in *Berger* v. *United States,* 295 U. S. 78, and other representative decisions such as *National Labor Relations Board* vs. *Air Associates,* 121 Fed. (2d) 586, and *United States* v. *Perlstein,* 120 Fed. (2d) 276, that the right to a fair trial is a civil right of "peculiar sacredness", guaranteed by the Constitution, the invasion of which through the misconduct of the District Attorney, particularly in a close case, is reversible error.

3. The Circuit Court of Appeals held that the reading by the District Attorney of a hearsay statement depicting the petitioners as criminals and associates of criminals, alleged to have been made by the witness Hahn, was proper to refresh the recollection of the witness, although the District Attorney's stated purpose was to neutralize negative testimony given by her, on the plea of surprise when in fact he obviously was not surprised.

The decision in this respect conflicts with the decision of the Circuit Court of Appeals for the Fifth Circuit in the case of *Young* v. *United States*, 97 Fed. (2d) 200, and the decision of the FIFTH Circuit in the case of *Sneed* v. *United States*, 298 Fed. 911, that a witness whose testimony the offeror knows in advance will be adverse may not be offered in order to get before the jury contradictory statements which are prejudicial and damaging hearsay. The decision is also in conflict with the principle announced by this Court in the case of *Socony Vacuum Oil Co.* vs. *U. S.*, 310 U. S. 150, that reversible error is committed by the deliberate use of refreshing material for purposes not material to the issues but to arouse the passions of the jurors.

4. After decision by three judges who originally heard argument, the case was redecided without further oral argument or a request therefor by five judges. We may safely assume that this action of the Court was prompted by its decision that the case was either exceptional or that there was a difference in view among the judges on a question of fundamental importance. It is also likely that in the instant case two of the three judges who had heard argument may have had a view contrary to that of the other three judges of the Court. See *Commissioner of Internal Revenue* v. *Textile Mills Securities Corporation*, 117 Fed. (2d) 62, 71, and *Oughton* v. *National Labor Relations*

Board, 118 Fed. (2d) 486, 494. Yet despite these reasons which prompted the Court to sit *en banc* and redecide the case, it did not call for a reargument.

It is submitted that by this action the court below has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

Wherefore your petitioners pray that a writ of certiorari issue out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Third Circuit; commanding the said Court to certify and send to this Court for its review and determination, as provided by law, this cause and a complete transcript of the record and all proceedings had herein; to the end that this case may be reviewed and determined by this Court as provided for by the statutes of the United States, and that the judgments herein of the Circuit Court of Appeals may be reversed and that petitioners may have such other and further relief in the premises as this Court may deem appropriate.

ANTHONY MAGGIO,
CARL IPPOLITO,
GUGHELIMO CICCONE,
BARTHOLOMEW DINOLA,

By HAROLD SIMANDL,
Attorney for and of Counsel with
Petitioners.

Certificate.

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Petitioners,

against

THE UNITED STATES OF AMERICA,
Respondent.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX, } ss.:

I hereby certify that I have examined the foregoing Petition for a Writ of Certiorari and that in my opinion it is well founded and the case is one in which the petition should be granted.

HAROLD SIMANDL,
Attorney for and of Counsel with
Petitioners.

IN THE

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OCTOBER TERM—1941.

ANTHONY MAGGIO, CARL IPPOLITO, GUGHELIMO CICCONE, and BARTHOLOMEW DINOLA,
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THE UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of the Court Below.

The opinion of the Circuit Court of Appeals is printed on page 720 of the Record. The amended opinion is printed on page 745 of the Record.

II.

Jurisdiction.

(1) The jurisdiction of this Court is invoked under Section 240(A) of the Judicial Code as amended by the Act of February 13th, 1925, c. 299, 43 Stat. 938 (28 U. S. C. A. 347).

(2) The judgment of the Circuit Court of Appeals was entered on January 30th, 1942 (R. 729). A petition for rehearing was duly filed (R. 730) and denied on March 4th, 1942 (R. 745).

III.

Statement of the Case.

A full statement of the case is included in the preceding petition under Title IV, page 7.

IV.

ARGUMENT.

POINT I.

Petitioner Ippolito's right to choose whether or not to testify, as guaranteed by the Constitution and Statute, was invaded by Court action.

When the Government announced it had no further evidence to present and rested its case, the defendants made appropriate motions for a directed verdict of acquittal (R. 399). The Trial Court, in refusing to grant the motions of Ippolito and DiNola, did so without stating any reasons (R. 400, 402).

At that time, all that had been proved against Ippolito was that he had, prior to the seizure of the still, met and associated with some of those who were convicted. Such meetings were casual, either at his home, a rooming house, or in public places, like restaurants. Such evidence was not sufficient to warrant an inference of guilt.

United States vs. *Falcone,* 311 U. S. 205, 210.

In the absence of any evidence from which guilt could be properly inferred, it was the plain duty of the Court to grant his motion and acquit him.

Gracefo vs. *United States* (C. C. A. 3), 46 Fed. (2) 852;

Paul vs. *United States* (C. C. A. 3), 79 Fed. (2) 561;

Nicola vs. *United States* (C. C. A. 3), 72 Fed. (2) 780.

If the government did not have sufficient evidence to *prima facie* establish his guilt, it should not have set the indictment for trial.

It will be noted that after the motion for a directed verdict of acquittal was made, the government did not, prior to the Court's decision, request a further opportunity to introduce additional testimony. It was content to rest upon the evidence as it stood when the motion was made.

If the petitioner Ippolito had received, at the Trial Court's hands, that to which the law and justice entitled him, he would have been acquitted, and anything that thereafter transpired at the trial would not have affected that status. The trial so far as concerned him should have ended at that point.

If the Trial Court had ruled correctly on his motion, he would not have been driven to decide whether to take the witness stand and call witnesses, and suffer the possibility of thereby convicting himself, or remain off and not call witnesses at the peril of having inferences drawn against him from his silence or failure to call such witnesses.

The effect of the Trial Court's ruling was to compel the defendant to choose to become a witness against himself. It cannot be said that he freely and without coercion re-

quested to become a witness. He did so only to escape the effects of the erroneous, adverse ruling of the Trial Court. Instead of affording him the protection and shelter which the law gave him, the Trial Court, by its erroneous ruling, removed it completely.

> *Bruno* vs. *United States*, 308 U. S. 287, 293;
> *McKnight* vs. *United States*, 115 Fed. 972, 981.

The Act of March 16, 1878, 20 Stat. at L. 30, c. 37, now 28 U. S. C. A. 632, was enacted in the light of the Fifth Amendment to the Constitution. The statute afforded accused the right to be a witness "at his own request and not otherwise". He was thus given the right to make a free and voluntary choice in that regard without the intrusion of any unlawful coercion, calculated to require him to pursue one course in preference to another. The statute prohibits the exertion by the Trial Court or the District Attorney, of any such coercion, direct or indirect.

Since the Trial Court gave no reason for its ruling, the record reveals no more than would be revealed had the Trial Court deliberately declined to direct a verdict of acquittal for the sole purpose of requiring or coercing the accused into testifying against himself.

The Circuit Court of Appeals did not find it necessary to decide the issue thus presented by the record. Instead it chose to consider that there was present in the record prior to the making of the motion, testimony which was not in fact present. Cf. Bematre's testimony (R. 563).

It ruled that since the trial was in progress at the time the government applied to reopen its main case, and, over objection, was permitted to introduce the testimony of Bematre, the Trial Court in exercising its power to control the order of proof at the trial, did not abuse its discretion.

However, this ruling overlooks the fact that the trial as to Ippolito was in fact in progress, due solely to the erroneous ruling of the Trial Court on the motion, which also resulted in the invasion of his rights hereinbefore outlined. It overlooks the fact that the Trial Court exercised its discretion at a time when, had the law been correctly administered, he should have been freed of any obligation to be present at the trial.

Where a constitutional or statutory right of an accused is invaded, Appellate Courts in seeking to determine the validity of a claim that such right has been invaded, have invariably determined the validity of such claim, by viewing the record as of the time the claimed invasion took place. They have not permitted that which was brought to light through the invasion of the right to affect or destroy or weaken the claim. Thus, when a claim has been made that rights under the Fourth and Fifth Amendments have been invaded due to lack of probable cause, the invasion has been held not cured, justified and legalized by what has followed such unlawful invasion.

Byars vs. *United States*, 273 U. S. 28;
United States vs. *Lefkowitz*, 285 U. S. 452;
Go-Bart Importing Co. vs. *United States*, 282 U. S. 344.

If the Appellate Court had, in reviewing the record on appeal, invoked the aforementioned principles which undoubtedly controlled, it would have declined to consider the evidence which came into the case solely through the invasion of the rights of the petitioner Ippolito.

There is no provision in the New Jersey Constitution similar to that contained in the Fifth Amendment declaring that no person shall be compelled in any criminal case

to be a witness against himself. A man in New Jersey cannot be compelled to be a witness against himself solely by force of the common law.

> *State* vs. *Zdanowicz*, 69 N. J. Law 619, 55 Atl. 743.

However, the courts of New Jersey have recognized that the validity of a court's ruling on a motion to acquit made at the close of the State's case must be tested by the evidence in the case when the motion was made, and not otherwise, for any other course would "come perilously near to compelling the accused to convict himself."

> *State* vs. *Bacheller*, 89 N. J. Law 433;
> *State* vs. *Pruser*, 127 N. J. Law 97.

We have been unable to find any Federal decisions which have ruled on the precise question herein presented.

This Court has repeatedly declared that constitutional provisions for the security of persons and property, are to be liberally construed, and "it is the duty of Courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon".

> *Boyd* vs. *United States*, 116 U. S. 616, 635;
> *Byars* vs. *United States*, *supra*.

Of course, similar considerations must be afforded statutes which are enacted to carry into effect and safeguard such constitutional provisions.

If the action of the Court below is not reversed, a practice will be sanctioned which would permit the denial of an accused's motion for a directed verdict of acquittal, although there is no evidence in the record tending to establish his guilt. Such a practice would compel an accused at

his peril, to either forego making a defense on the merits, or else continue the trial and risk the possibility of having his own testimony or the testimony of such witnesses as he may call, convict him. Only by adherence to the rule pursued by the courts in New Jersey as cited in the case of *State* vs. *Bacheller, supra,* will the right of an accused be properly safeguarded and the protection intended by the constitutional and statutory provisions fully and effectively assured.

POINT II.

Petitioners were denied a fair trial by the District Attorney's misconduct.

The District Attorney deliberately elicited testimony that petitioner DiNola and another attacked and robbed a witness. The court below found that the robbery had no bearing upon the charges in the indictment (R. 728). It concluded however that the answers were non-responsive and unsolicited by the United States Attorney (R. 728). Because of this finding it refused to reverse. Yet it is obvious that the questions were not ambiguous and were deliberately designed to produce the testimony complained of (R. 575). Furthermore, as is hereinafter argued, the District Attorney by his improper cross examination of the witness Hahn, brought before the jury hearsay statements that the petitioners and their associates were underworld characters.

It is respectfully urged that the misconduct of the District Attorney in thus deliberately producing testimony of the attack and robbery and improperly blackening the characters of the petitioners, deprived them of a fair trial, and that in failing to reverse for such misconduct the decision

of the court below is in conflict with applicable decisions of this Court and of other authorities.

Berger v. *United States*, 295 U. S. 78;
National Labor Relations Board v. *Air Associates*, 2 Cir., 121 Fed. (2d) 586;
United States v. *Perlstein*, 3 Cir., 120 Fed. (2d) 276;
Scheinberg v. *United States*, 2 Cir., 213 Fed. 757.

The perfunctory direction to the jury to disregard the evidence of the robbery did not cure the error. In fact the court below, in failing to reverse, placed no reliance on such direction (R. 728). This Court and other courts as well have held that an invasion of the right to a fair trial is not to be lightly disregarded and that if the misconduct probably affected the jury the convictions must be reversed.

Berger v. *United States, supra;*
Singer vs. *U. S.*, 58 F. (2d) 74;
Robinson vs. *U. S.*, 32 F. (2d) 505.

In the light of evidence of association the misconduct affected not only DiNola but the other petitioners, and accordingly prejudiced all.

Whealton v. *United States*, 3 Cir., 113 Fed. (2d) 710;
United States v. *Thomson*, 7 Cir., 113 Fed. (2d) 643.

POINT III.

The cross examination of the government witness Hahn by the District Attorney was prejudicial error.

Mrs. Hahn was asked whether any of the petitioners were or were not in a restaurant within a certain period of time, a matter which, as the court below found, had no direct or great significance (R. 726). She testified that she could not recognize any of the petitioners as patrons of that restaurant. The District Attorney knew from her testimony given at a prior trial, a transcript of which was in his possession (R.204,209), that she could only name two persons as patrons. He must have known too from her statement made to a government investigator the day before she testified in the instant trial, that she could not identify any of the petitioners as patrons and intended to give such testimony when called. Hence, when called to the stand, she gave the testimony expected of her. Such testimony was negative in character in that she failed to recognize any of the petitioners.

The District Attorney was accordingly not legally surprised at Mrs. Hahn's testimony. Surprise results only when a witness has given evidence contrary to what the District Attorney had just cause to expect from him, and even then a prior inconsistent statement may not be read if the evidence is merely negative in character and not prejudicial to the government's case. *6 Jones Commentaries on Evidence* (2nd Ed.) pages 4810, 4813. This is necessarily so since the production of the prior contradictory statement is to neutralize the testimony given by nullifying and removing the adverse and unexpected assertion. *Wigmore on Evidence* (3rd Ed.) Section 902.

Since the District Attorney stated that his object in cross examining Mrs. Hahn was to impeach her (a practice which is improper and condemned, *Wigmore on Evidence* (3rd Ed.), Section 896), and to neutralize her testimony counsel for the petitioners properly stated that he would consent that her testimony be struck (R. 186). See *Young* v. *United States*, 5 Cir., 97 F. (2) 200, 205. The offer was declined for the reason which then became apparent that the District Attorney wanted to bring before the jury the hearsay statement alleged to have been made by the witness depicting petitioners as underworld characters and associates of criminals. It is noteworthy that the court below condoned the cross examination on the ground that the District Attorney had the right to refresh the witness' recollection when in fact his stated purpose was merely to neutralize the testimony, and the witness had not indicated a lack of memory.

In deciding that the action complained of was proper the court below decided the case in conflict with applicable decisions of this Court and of other authorities which hold that prior statements may not be used as refreshing material when their use is designed to prejudice the jury against the defendants.

> *Socony Vacuum Oil Co.* v. *United States*, 310 U. S. 150;
> *Young* v. *United States*, 5 Cir., 97 (2d) 200;
> *Sneed* v. *United States*, 5 Cir., 298 Fed. 911;
> *Rosenthal* vs. *United States*, 8 Cir., 248 Fed. 684.

It must be remembered that without Bematre's testimony no case had been made against Ippolito. After Bematre had testified Ippolito's case depended upon whether the jury would believe him or Bematre. The case against him and against Maggio, the evidence as to the

latter being wholly circumstantial, was weak, and the scales being thus delicately balanced any evidence depicting Ippolito and Maggio as criminals or associates of criminals tended to detract from their credence. In such circumstances this Court has held that prejudice is so highly probable that its non-existence may not be assumed. *Berger* v. *United States, supra.*

Accordingly, in failing to reverse for such error the court below failed to follow the applicable decisions of this Court.

POINT IV.

The lower Court's decision by a five-judge court, two of whom had not heard argument, was contrary to the practice assured by the rules to all appellants.

The case was argued before three judges of the Court below, who later concurred in an opinion by which the judgments below were affirmed (R. 719, *et seq.*). A petition for re-hearing was duly filed (R. 730). The case was then re-decided by all five Judges of the Court sitting *en banc* (R. 745).

Petitioners were not invited to orally argue the matter before the additional Judges who had not participated in the original decision. Nor were petitioners advised that the rules of the Court would be relaxed, modified or changed by the Court in deciding their appeal.

In the case of *Commissioner of Internal Revenue* vs. *Textile Mills Securities Corporation,* 117 Fed. (2) 62, 71, affirmed by this Court, 84 L. Ed. 242, the Court below said:

> "It has been the practice for the circuit courts of appeals to sit in groups of three judges. We think the practice is an excellent one which should

> be followed in all but exceptional cases. Where, however, there is a difference in view among the judges upon a question of fundamental importance, and especially in a case where two of the three judges sitting in a case may have a view contrary to that of the other three judges of the court, it is advisable that the whole court have the opportunity, if it thinks it necessary, to hear and decide the question."

In the case of *Oughton* vs. *National Labor Relations Board*, 118 Fed. (2) 486, 494, the same Court said that a consideration of a case by all Judges of the Court—

> "removes any possibility that the majority opinion of the court, when composed as ordinarily of three judges, may conflict with the majority opinion of the court when composed of one of the same judges and the two remaining judges of the court. The majority opinion of all will be binding upon all regardless of the views of individual judges."

In each of the aforementioned cases, before the five Judges of the Court essayed to participate in the decision, they afforded oral argument to the parties on the issues. This was not accorded the petitioners in this case.

In view of the statements of the Court below, contained in the aforementioned cases, we may properly assume that the instant case was either exceptional or that there was a difference in view among the Judges on a question of fundamental importance, or, that two of the three Judges who had heard argument, had a view contrary to that of the other three Judges of the Court. Despite these reasons which prompted the Court to sit *en banc* and re-decide the case, it did not call for a re-argument.

That oral argument is regarded as of great value to the Courts as well as the litigants is evidenced by the fact

that the Court has itself provided in its rules for such oral argument. The Court's power to relax any rule is not denied. However, where a relaxation of a rule may deprive a litigant of a substantial right or privilege, common justice requires that the litigant be heard before the rule is relaxed. The rule of Court contemplates that all litigants properly before the Court should have an opportunity to orally argue the pertinent issues before the Court arrives at a decision. *A fortiori* is this true in exceptional cases involving questions of fundamental importance.

It is respectfully submitted that by this action complained of, the Court below has so far departed from the accepted and usual course of judicial proceedings, as to call for the exercise of this Court's power of supervision.

Conclusion.

For the foregoing reasons, it is submitted that the fundamental questions involved in this application, are of sufficient importance to require the exercise of this Court's supervisory jurisdiction by a writ of certiorari.

Dated: April 3, 1942.

Respectfully submitted,

HAROLD SIMANDL,
Attorney for and of Counsel with
Petitioners.

ANTHONY A. CALANDRA,
on the brief.

Appendix.

Statute Involved.

Act of March 16, 1878, 20 Stat. at L. 30, chap. 37, now 28 U. S. C. A., sec. 632:

> "In the trial of all indictments, informations, complaints, and other proceedings against persons charged with the commission of crimes, offenses, and misdemeanors, in the United States courts, Territorial courts, and courts martial, and courts of inquiry, in any State or Territory, including the District of Columbia, the person so charged shall, at his own request but not otherwise, be a competent witness. And his failure to make such request shall not create any presumption against him."

Rules Involved.

Rules of the United States Circuit Court of Appeals for the Third Circuit:

Rule 33.

Oral Arguments.

1. Opening and Closing. The appellant or petitioner in this court shall be entitled to open and conclude the argument of the case. But when there are cross appeals or petitions they shall be argued together as one case, and the plaintiff or petitioner below shall be entitled to open and conclude the argument.

4. Submission on Briefs. Any case called for argument may, with the consent of the court, be submitted on briefs without oral argument if counsel on both sides desire to submit it in that manner.

Rule 35.

Petitions for Rehearing.

1. When Filed—Form—Oral Argument. A petition for rehearing may be filed with the clerk of this court within 15 days after judgment is entered, unless the time is enlarged by order of the court. It must be printed, and briefly and distinctly state its grounds, and be supported by a certificate of counsel to the effect that it is presented in good faith and not for delay. Such a petition is not subject to oral argument and will not be granted, unless a judge who concurred in the judgment desires it, or a majority of the court *en banc* so determines.

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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 1120

ANTHONY MAGGIO, CARL IPPOLITO, GUGHELIMO CICCONE, AND BARTHOLOMEW DI NOLA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 720–728, 745–747) is reported in 126 F. (2d) 155.

JURISDICTION

The judgment of the circuit court of appeals was entered January 30, 1942 (R. 729). On March 4, 1942, the circuit court of appeals denied a petition for rehearing (R. 747). The petition for a writ of certiorari was filed April 7, 1942.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the denial of petitioner Ippolito's motion for a directed verdict at the close of the Government's case compelled him to testify in his own behalf in violation of the Fifth Amendment.

2. Whether the unsolicited and unresponsive answer of a Government witness which improperly implicated one of the petitioners in a collateral crime of robbery warrants reversal of the judgments of conviction.

3. Whether the trial court improperly permitted the prosecutor to cross-examine a Government witness, whose testimony surprised him, upon the basis of prior contradictory statements.

4. After the circuit court of appeals, three judges sitting, affirmed petitioners' convictions, they filed a petition for a rehearing. The circuit court of appeals, five judges sitting *en banc*, denied the petition and amended the opinion previously rendered. Petitioners raise the question whether they were entitled to oral argument on their petition before the circuit court of appeals sitting *en banc*.

STATEMENT

Petitioners and eight others[1] were indicted on December 18, 1940 (R. 1), in the United States District Court for the District of New Jersey on five counts. Four of the counts charged violation of Sections 2810, 2812, 2833, and 2834 of the Internal Revenue Code (26 U. S. C. 2810, 2812, 2833, 2834) relating to the possession, manufacture, and concealment of alcohol, and the failure to register a still, etc. The fifth count charged a conspiracy to commit the foregoing offenses in violation of Section 37 of the Criminal Code (18 U. S. C. 88) (R. 21–27). Three of the defendants pleaded guilty (R. 5, 8, and see R. 19), one was acquitted at a prior trial (R. 37–38), and a severance was granted as to four others (R. 11, 29). After one trial which ended in a mistrial (R. 9), petitioners were found guilty on all counts of the indictment (R. 13). With the exception of petitioner Ippolito, who received an additional year of imprisonment on the fourth count, all the petitioners received the following similar sentences: two years' imprisonment and a fine of $100 on count one; two years' imprisonment, a fine of $100, and a penalty of $500 on count two; a fine of $100 and a penalty of $1,000 on count three; one year of imprisonment and a fine of

[1] The other defendants were Joseph Bematre, William Joseph Biondi, Joseph Marcanthony, Charles Tourine, Sidney Popkin, Morris R. Gordon, Jane Doe Forconi and Felix Forconi.

$500 on count four; and two years' imprisonment and a fine of $100 on count five. The terms of imprisonment on counts one, two and five were to run concurrently, but the term of imprisonment on count four was to run consecutively, making three years in all (R. 14–16). Upon appeal the judgments of conviction were affirmed (R. 729).

The Government's case may be summarized as follows:

In January 1940, petitioners Ciccone, Di Nola, and Ippolito, as well as Bematre, Angelo Merino and Popkin attended a meeting at Ciccone's home at which they discussed plans for setting up a still at 1060 Revere Avenue, in Trenton, New Jersey, and where to procure parts for it (R. 564–565). They also decided that Ciccone and Lamantia would install the still (R. 564–565), and that they would share the profits equally (R. 568). At a subsequent meeting, $800 was given to Ciccone with which to purchase necessary equipment for the still (R. 566–567). Petitioners Ippolito and Di Nola accompanied him on several occasions while he purchased the requisite equipment (R. 567–568). In February 1940, petitioner Ciccone, after receiving money from Bematre, drove to New York and brought back some round "brass colored" pipes (R. 272). A garage at 416 Cuyler Avenue in Trenton, New Jersey, was rented and equipment, as well as sugar, stored there (R. 32, 61–63, 571).

Petitioner Maggio accompanied Marcanthony when the latter borrowed a truck with which he and one Bornhorst hauled three water tanks from a tinsmith to Bornhorst's garage, where they were stored until the next morning (R. 124–129, 332). Ciccone also used the same truck to haul other equipment to 1060 Revere Avenue where the still was situated (R. 41, 572–573), and after delivery of the still parts, Ciccone, Biondi, and Lamantia set up the still (R. 568–569).

The petitioners and other defendants commonly consorted together from the inception of the scheme until the raid several weeks later (R. 141, 162, 167, 175–176, 215–216, 236, 237, 238, 243–244, 247, 249, 259, 263, 274). In the middle of February 1940, on at least one occasion petitioners Ippolito, Di Nola, Ciccone and others met at 1060 Revere Avenue (R. 569, 570, 577), and in Bematre's room to discuss the operation of the still and plans for raising additional money to finance the scheme (R. 573). Ciccone offered Lamantia a job operating a still (R. 271), and Ciccone was heard talking to Bematre about sugar and yeast (R. 273). There was also direct testimony that petitioners Ippolito, Di Nola, and Ciccone, among others, "were interested in this still" (R. 565, 601).

Shortly after 8:00 p. m. on February 24, 1940, police officers observed twenty 100-pound bags of sugar in the garage at 416 Cuyler Avenue. Later the officers entered the garage and found also thirty-four 5-gallon cans, which bore the odor of

gasoline (R. 32–33). Bematre was then arrested as he approached the garage (R. 33–34). The police officers proceeded to 1060 Revere Avenue where they detected the odor of alcohol when they walked alongside (R. 37). They also observed a 250-gallon oil tank in the rear of these premises (R. 38). The premises were thereafter kept under surveillance by a police officer (R. 38, 40).

Between 1:00 and 6:00 a. m. on February 25, 1940, petitioners Ciccone and Di Nola were in an auto cruising about the vicinity of 1060 Revere Avenue. Several times it slowed down and almost stopped when approaching that address (R. 294, 295, 307, 309). About 4:15 a. m. Ciccone and Di Nola caught the attention of a police officer with whom they were acquainted. Upon the officer's approach, Di Nola said, "A fellow in the back here wants to see you." Thereupon Ciccone, who was in the rear of the car, inquired whether the officer knew "anybody over on Revere Avenue" and stated, "There's a grand in it to get that cop away from there for two hours." (R. 320, 321.)

At 6:00 a. m. that same morning, the car in question stopped a few doors from 1060 Revere Avenue. After a few moments it proceeded into the alley in back of Revere Avenue and stopped in the rear of 1060. A man ran from the yard and jumped into the car which was then driven away (R. 295, 307–308). About 10:00 a. m. the next morning, the police officers entered the Revere Avenue

premises and found a still with a capacity of between 500 and 1,000 gallons (R. 41, 43). In the cellar they found a steam boiler, a Gould electric pump, an oil burner attached to the steam boiler, a molasses mixing tank, approximately 75 pounds of yeast, and a bag of urea, a chemical which hastens the fermentation of mash (R. 41). On the second floor they found some distilling apparatus consisting of a cooker, two receiving tanks, a copper column and two 5-gallon cans full of alcohol (R. 42, 66–67). Neither can bore a revenue tax stamp, nor was there any sign on the premises indicating that the still was registered (R. 43). On the third floor they found the remainder of the distilling apparatus, which consisted of a dephlegmator, a cooling tank with copper coils and eight galvanized vats containing approximately 3,200 gallons of mash (R. 42, 66–67). The burner in the basement, still warm at the time of the raid (R. 44), was identified as identical to one sold to petitioner Maggio in December 1939 (R. 74–78, 86).

Shortly after the raid, several of the defendants, including Ciccone and Maggio, gathered at the home of Mrs. Bornhorst (R. 333–334, 340). On this occasion Maggio asked Biondi how they eluded the police raid at the Revere Avenue house (R. 342–345). Later, when all the men were in Mrs. Bornhorst's kitchen, Marcanthony said, "We put it over on them that time" (R. 344). A neighbor had given them a signal (R. 344).

ARGUMENT

1. Petitioner Ippolito makes the novel contention that the effect of the trial court's denial of his motion for a directed verdict at the close of the Government's case "was to compel the defendant to choose to become a witness against himself" in contravention of the Fifth Amendment (Pet. 18–19). This contention is patently frivolous, for, clearly, Ippolito's exercise of his privilege of adducing evidence and testifying in his own behalf cannot be viewed as compulsion in any degree.[2]

Moreover, it is plain that the motion was properly denied. The existence of the conspiracy having been shown, Ippolito's participation therein may properly be inferred from the frequency of his day and night-time visits to Bematre's room from the middle of January to the time of the raid (R. 215–216), his close associations with other defendants during the same period (R. 236, 238, 243–244, 247) and the fact that he was seen working around the premises on at least two occasions shortly before the raid (R. 96). "The verdict of a jury must be sustained if there is substantial evidence taking the view most favorable to the

[2] Motions for directed verdicts were also made by the other petitioners, and upon their denial (R. 12–13) each of them testified on his own behalf. Since none of them joined in Ippolito's contention, they impliedly concede that there was sufficient evidence as to their guilt to go to the jury.

Government, to support it." *Glasser* v. *United States,* Nos. 30–32, this Term, decided January 19, 1942. And where a conspiracy is established, slight evidence connecting the defendant therewith may still be substantial and, if so, sufficient to sustain a conviction. *Meyers* v. *United States,* 94 F. (2d) 433 (C. C. A. 6), certiorari denied, 304 U. S. 583; *Galatas* v. *United States,* 80 F. (2d) 15, 24 (C. C. A. 8), certiorari denied, 297 U. S. 711.[3]

In any event, petitioner concedes (Pet. 2, 26) "that Bematre's testimony implicated Ippolito in the offenses charged in the indictment," and as the court below held (R. 724) "the order in which testimony is presented at a criminal trial is solely within the discretion of the trial judge." *Goldsby* v. *United States,* 160 U. S. 70, 74; *Diehl* v. *United States,* 98 F. (2d) 545, 548 (C. C. A. 8); *United*

[3] Similarly, with respect to the counts charging substantive offenses, it is settled that if a conspiracy is shown, as in the present case, the acts and declarations of one defendant, outside the presence of his co-defendants, but in the course of the conspiracy, are admissible against the latter, even though a conspiracy is not charged in the indictment. *Hitchman Coal & Coke Co.* v. *Mitchell,* 245 U. S. 229, 249; *Lincoln* v. *Claflin,* 7 Wall. 132, 139; *United States* v. *Cohen,* 124 F. (2d) 164, 166 (C. C. A. 2), certiorari denied, *sub nom. Bernstein* v. *United States,* No. 870, this Term, March 2, 1942; *Quercia* v. *United States,* 70 F. (2d) 997, 998–999 (C. C. A. 1), reversed on other grounds, 289 U. S. 466; *Friscia* v. *United States,* 63 F. (2d) 977, 981 (C. C. A. 5), certiorari denied, 289 U. S. 762; *Zarate* v. *United States,* 41 F. (2d) 598, 599 (C. C. A. 5), certiorari denied, 282 U. S. 867.

States v. *Hirsch*, 74 F. (2d) 215, 219 (C. C. A. 2).[4] Therefore, even if the trial court's ruling were erroneous, in the light of the entire record, the error was so insubstantial as not to warrant reversal. Section 269 of the Judicial Code (28 U. S. C. 391); *Spivey* v. *United States*, 109 F. (2d) 181, 186 (C. C. A. 5), certiorari denied, 310 U. S. 631; *Borum* v. *United States*, 56 F. (2d) 301, 303–304 (App. D. C.), certiorari denied, *sub nom. Logan* v. *United States*, 285 U. S. 555; *Haywood* v. *United States*, 268 Fed. 795, 798 (C. C. A. 7), certiorari denied, 256 U. S. 689. As the court below observed (R. 724) "the trial of a criminal case is not a game in which a guilty defendant is entitled to go free merely because, at an intermediate stage of the proceedings the government through no fault of its own has not been able to offer evidence, later procured and offered, which establishes the defendants' guilt." Cf. *McGuire* v. *United States*, 273 U. S. 95, 99.

2. Petitioners' assertion that the Assistant United States Attorney deliberately elicited testimony unrelated to the charges that petitioner Di Nola and another assaulted and robbed Bematre is

[4] It was not until after the defendants had completed their testimony that Bematre, who was named in the indictment, expressed a desire to testify for the Government (R. 563, 607, 613-614). His testimony completely disclosed the activities of the defendants and supplemented, particularly, the evidence against petitioner Ippolito by showing the objects and purposes of the various meetings which the evidence showed that Ippolito had attended (R. 565, 623).

unwarranted by the record. As the court below found (R. 728), "the answers were non-responsive and unsolicited by the United States attorney." Immediately preceding Bematre's objectionable response the following colloquy occurred (R. 575):

> Mr. Tuso [Defense counsel]. May I inquire is this in connection with the charges?
>
> Mr. Stanziale [Assistant United States Attorney]. Yes, in connection with the still.

When the witness volunteered the information, the Assistant United States Attorney was the first to protest, "No, no, about the still." (R. 575; see also R. 576). The judge immediately instructed the jury to disregard the statement and not permit it to enter into their deliberations (R. 576), and again, in his final charge, told them not to predicate their verdict upon anything which had been excluded by the court (R. 674).

Moreover, on cross-examination of Bematre, petitioner Di Nola's counsel examined him with respect to the alleged robbery, apparently to show prejudice on his part (R. 610), and thereby, as the court below said (R. 728) "opened the door to reexamination of this point by government counsel."

It is clear, therefore, that any prejudice which may have resulted from the reference to the robbery was adequately cured both by the trial court's instructions to the jury (*Throckmorton* v. *Holt*, 180 U. S. 552, 567; *United States* v.

Nimerick, 118 F. (2d) 464, 466 (C. C. A. 2), certiorari denied, 313 U. S. 592; *Jackson* v. *United States,* 66 F. (2d) 280, 283 (App. D. C.), certiorari denied, 290 U. S. 626; *United States* v. *Rosenstein,* 34 F. (2d) 630, 634–635 (C. C. A. 2), certiorari denied, 280 U. S. 581) and by the deliberate reopening of the matter by petitioners' counsel.

3. Petitioners' contention (Pet. 6–7, 13, 25–27) that the trial court improperly permitted the Assistant United States Attorney to introduce prior contradictory statements [5] to neutralize the testimony of Government witness Hahn is without merit. Mrs. Hahn testified that she was unable to identify any of the petitioners as patrons of the Cypress Restaurant where she formerly worked (R. 182). Previously, however, in a statement made in May 1940, she had identified both Ippolito (R. 190) and Maggio (R. 187, 188) as patrons and at a previous trial she had identified Maggio as such a patron (R. 205). Thereupon the Assistant United States Attorney, pleading surprise, requested and obtained permission to ask the witness certain questions, based on her prior statement, in order to

[5] Petitioners' claim (Pet. 23) that during his examination of witness Hahn, the Assistant United States Attorney "brought before the jury hearsay statements that the petitioners and their associates were underworld characters" refers to the prior statement made by the witness Hahn in which she referred to one of the petitioners as a member of the "Big Four" (R. 188). But there is nothing in the record to show that the "Big Four" was a "sinister" underworld characterization.

neutralize her testimony (R. 185, 186). It is settled law that the trial court in its discretion, may, as in the present case, allow the prosecutor to examine his own witness as to prior contradictory statements if the witness' testimony takes him by surprise.[6] *Hickory* v. *United States,* 151 U. S. 303, 309; *Walker* v. *United States,* 104 F. (2d) 465, 470 (C. C. A. 4); *United States* v. *Graham,* 102 F. (2d) 436, 441–442 (C. C. A. 2), certiorari denied, 307 U. S. 643; *Curtis* v. *United States,* 67 F. (2d) 943, 946 (C. C. A. 10). *Di Carlo* v. *United States,* 6 F. (2d) 364, 367–368 (C. C. A. 2), certiorari denied, 268 U. S. 706.

4. Petitioners' contention (Pet. 7, 13–14, 27–29) that they were entitled to oral argument on their petition for rehearing before the circuit court of appeals sitting *en banc* is quickly disposed of by Rule 35 of the Rules of the Circuit Court of Appeals for the Third Circuit, set out in the Appendix to petitioners' brief (Pet. 31). This rule provides:

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[6] Petitioners' assertion that the prosecutor "obviously was not surprised" (Pet. 13, 6, 25) is unwarranted. While it is true that Mrs. Hahn testified that on the preceding day she told an "Investigator" that she was not then positive in her identification of any of the petitioners (R. 192), there is nothing in the record to show who the "Investigator" was, what his connection with the case was, or that the Assistant United States Attorney was advised of that statement (see R. 201). In any event, as the court below said (R. 726), the trial court was entitled to accept the prosecutor's claim of surprise without more. *United States* v. *Graham,* 102 F. (2d) 436, 441–442 (C. C. A. 2).

> Such a petitione is not subject to oral argument and will not be granted, unless a judge who concurred in the judgment desires it, or a majority of the court *en banc* so determines.

It is clear that this rule contemplates consideration of petitions for rehearing by the court *en banc,* even though only three judges heard the argument on appeal.[7]

CONCLUSION

The decision below is correct, and there is involved no conflict of decisions or any question of general importance. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

CHARLES FAHY,
Solicitor General.
WENDELL BERGE,
Assistant Attorney General.
OSCAR A. PROVOST,
HENRY J. FOX,
WALTER J. CUMMINGS, JR.,
Attorneys.

MAY 1942.

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[7] Nothing in *Commissioner* v. *Textile Mills Securities Corp.*, 117 F. (2d) 62 (C. C. A. 3), aff'd, 314 U. S. 326, or *Oughton* v. *National Labor Relations Board*, 118 F. (2d) 486 (C. C. A. 3), relied on by petitioners (Pet. 27–28), suggests the contrary. In both of those cases arguments were heard by the entire court sitting *en banc* after the petition for rehearing had been granted. Neither case, however, suggested that one who petitions for rehearing is entitled to oral argument on the petition itself.

U. S. GOVERNMENT PRINTING OFFICE: 1942

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 1120.

ANTHONY MAGGIO, CARL IPPOLITO, GUGHELIMO CICCONE, and BARTHOLOMEW DiNOLA,
Petitioners,

against

THE UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

PETITIONERS' REPLY BRIEF.

HAROLD SIMANDL,
Attorney for and of Counsel with Petitioners.

ANTHONY A. CALANDRA,
On the Brief.

Arthur W. Cross, Inc., Law Printers, 71-73 Clinton Street, Newark, N. J.

PETITIONERS' REPLY BRIEF.

1. In its argument (Br. p. 8), the Government asserts that Ippolito "* * * was seen working around the premises on at least two occasions shortly before the raid (R. 96)". The statement is inaccurate. The witness merely stated, pointing at Ippolito: "This man here looks familiar" (R. 96).

She did not state that he was one of the men who was working there, or that he was ever on the premises. The fact that petitioner lived in Trenton all of his life, might account for her impression he "looked familiar to her".

During the cross examination of the witness, the District Attorney asserted: "* * * This witness has identified one Carl Ippolito". On counsel's protest that she had not, and at the request of counsel, the Court struck the remark, adding (R. 104, 105):

> "I will strike it from the record. What this witness said was that Carl Ippolito looks familiar to her.
>
> Mr. Stanziale: I will qualify my statement to that effect; this witness says one of the men working around there she believes was Carl Ippolito.
>
> (Page 105) Mr. Reich: I object, there was no such testimony, your Honor.
>
> The Court: I will strike it."

The Court's specific charge to the jury relating to this testimony is as follows (R. 691):

> "The witness Irma Todtenhausen did not testify that she saw the defendant Carl Ippolito do anything upon the premises where the still was set up—1060 Revere Avenue, Trenton, New Jersey. She did not

> even testify that she saw the defendant Ippolito upon the premises. Her testimony was only to the effect, as far as the defendant Ippolito was concerned, that he looked familiar to the witness Mrs. Todtenhausen."

In his brief below the District Attorney said (at p. 10):

> "There was other government testimony but it was not sufficiently definite to connect Ippolito. For instance, there was testimony by one Irma Todtenhausen that Ippolito looks familiar, when asked to identify a man who did certain work around the cellar of the still premises, but she did not definitely identify Ippolito as that man (Tr. 96)."

The Circuit Court of Appeals decided that (R. 722):

> "In addition to Bematre's testimony the evidence as to each of the defendants was as follows:
> Carl Ippolito: During approximately six weeks prior to the raid Ippolito was frequently seen in the company of Bematre, Ciccone, DiNola and Marcanthony."

The foregoing erroneous statement of fact made by the Solicitor General was inserted to escape the decision of this Court in *United States of America* vs. *Falcone*, 311 U. S. 205, at page 210, that:

> "It could not be inferred * * * from the casual and unexplained meetings of some of the respondents with others who were convicted as conspirators, that respondents knew of the conspiracy."

2. The Government points to a colloquy between the District Attorney and counsel, in order to establish that the witness's answer was wholly unexpected and unrespon-

sive. In light of the record, the colloquy establishes most clearly how really deliberately the District Attorney acted.

The District Attorney sought permission to talk to Bematre before he took the stand (R. 462, 63). It must be assumed he knew of the incident. If any doubt on that score still remains, the examination by the District Attorney (R. 639), where he led the witness through a recital of the intimate details, should remove any doubt remaining. After the motion for a mistrial, the obvious confusion of the District Attorney, as exhibited by his questions (R. 576), and the nature of the questions then asked which called for matters already in the record, indicates clearly the witness had nothing other than the "robbery incident" to talk about.

If the District Attorney wanted to find out if the witness had visited the still—a question—what happened to *you* personally would not elicit it.

Furthermore, assuming he knew of the incident, as we have a right to assume from what has been said, when the witness started to describe the robbery, and before he did so, the District Attorney could have *then said:* "No, no, about the still"—and thus prevent testimony of the robbery from coming to light. Instead, he led the witness on with the question: "What happened to you—" (R. 575),

We believe our assertion that the testimony was deliberately elicited is fully sustained by the record.

HAROLD SIMANDL,
Attorney for and of Counsel with
Petitioners.